Supreme Court, U.S.
FILED

97-261 AUG 7 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY DILLON, *et al.*,

Petitioners,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT, GERALD HANAS, NIPPON SHARYO KAISHA, LTD., SUMITOMO CORPORATION, LOUIS T. KLAUDER & ASSOCIATES, WILLARD BLEWETT and DAVID RIORDAN,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

KENNETH J. ALLEN
Counsel of Record
JAMES E. BRAMMER
KENNETH J. ALLEN
& ASSOCIATES, P.C.
1109 Glendale Boulevard
Valparaiso, Indiana 46383
(219) 465-6292
(219) 477-5181 Fax
Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

QUESTIONS PRESENTED

I. On January 18, 1993, two passenger trains collided killing seven people and injuring 149 others. The surviving passengers and decedents' estates brought products liability claims under state tort law. Does the Boiler Inspection Act preempt state tort actions against manufacturers of unreasonably dangerous and defective passenger train cars?

II. That the Due Process Clause imposes on government no affirmative duty to protect its citizens from imminent harm has long been the general rule. Various state and federal courts have fashioned divergent exceptions to this rule thereby imposing liability for resulting harm under 42 U.S.C. § 1983. When the state creates an obvious risk of harm and recklessly exposes citizens to it, or restricts safer, private alternatives, does the Due Process Clause impose a corresponding duty on the state to act or face § 1983 liability for harm resulting from its failure to act?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. *Medtronic, Inc. v. Lohr* set forth a new preemption analysis which should be reinforced and clarified in this case 6

II. This Court should resolve the confusion among the Circuits regarding the validity of certain exceptions to the general rule that government owes no duty under the Due Process Clause to protect its citizens from harm 10

A. "State-Restricted Alternatives" Exception .. 10

B. "State-Created Danger" Exception 12

III. The questions presented are important 17

CONCLUSION 18

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

Cases	PAGE(S)
Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988)	10, 11, 12, 13
Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982)	13, 16
Checki v. Webb, 785 F.2d 534 (5th Cir. 1986)	13
Cippollone v. Liggett Group, 505 U.S. 504, 112 S.Ct. 1062 (1992)	5, 7, 8, 9, 10
Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990)	13, 15
DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189, 109 S.Ct. 998 (1989)	13, 14, 15
Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993)	15
Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993)	13, 16
Eldridge v. Missouri Pac. R.R., 832 F. Supp. 328 (E.D. Okla. 1993)	9
Gregory v. City of Rogers, 921 F.2d 750 (8th Cir. 1990)	13
Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997)	9
L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2442 (1993)	13, 15
Mark v. City of Hatboro, 51 F.3d 1137 (3d Cir. 1995)	14, 15

Medtronic, Inc. v. Lohr, ___ U.S. ___,
116 S.Ct. 2240 (1996) . . . . . *passim*

Napier v. Atlantic Coast R.R., 272 U.S.
605, 47 S.Ct. 207 (1926) 6, 7, 9

Searles v. Southeastern Penn. Transp. Auth.,
990 F.2d 789 (3d Cir. 1993) 14

Springston v. Consolidated Rail Corp.,
863 F. Supp. 535 (N.D. Ohio 1994) 9

White v. Rochford, 592 F.2d 381 (7th Cir. 1979) . . . 12

Constitutional Provision

U.S. CONST. amend. XIV, § 1 3

Statutes

42 U.S.C. § 1983 . . . . . 2, 4

45 U.S.C. § 23 . . . . . 2, 4

Other Authorities

Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435 (1994) 16, 17

Petitioners Terry Dillon, individually and on behalf of all other passengers, spouses of passengers, dependent next of kin, and personal representatives of deceased passengers, all of whom are members of a certified class, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the Indiana Court of Appeals entered in the above proceeding on September 11, 1996, which the Indiana Supreme Court declined to review on May 9, 1997.

OPINIONS BELOW

The Indiana Court of Appeals' opinion is reported at 670 N.E.2d 902 and is reprinted in Appendix B, *infra*. The same court denied the Class' Petition for Rehearing on October 31, 1996. The Court of Appeals' Order denying the Petition for Rehearing is reprinted in Appendix D, *infra*. The Indiana Supreme Court declined to exercise its discretion to review the matter in an unpublished decision dated May 9, 1997. The Indiana Supreme Court's Order denying transfer is reprinted in Appendix A, *infra*.

JURISDICTION

The Indiana Supreme Court declined to review this matter on May 9, 1997. App. A. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Boiler Inspection Act, as it existed on January 18, 1993, provided in pertinent part:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the act of service of such railroad without unnecessary peril to life and limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, have been inspected from time to time in accordance with the provisions of Sections 22-29 and 31-34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations provided for.

45 U.S.C. § 23.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

The Fourteenth Amendment provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

On January 18, 1993, two passenger trains converged from opposite directions upon the Penn-Wabash gauntlet bridge, which contained only one track. The Northern Indiana Commuter Transportation District ("NICTD") owned, operated, and maintained the trains, the gauntlet bridge, and the track. The trains crashed head-on at the bridge, killing seven and injuring 149 others. Other defendants manufactured and/or sold the passenger cars in which the members of the Class were killed and injured.

The Class' Fifth Amended Complaint alleged that NICTD knew the bridge, which required eastbound and westbound trains to alternately cross over a single set of tracks, posed an extreme hazard to the safety of passengers yet NICTD's custom, policy, and practice was: to install an inadequate warning system which failed to alert engineers of oncoming trains and to rely instead on a signal light that had regularly failed; not to install motion sensors which would have warned the motormen or automatically stopped the trains before an imminent

collision despite repeated complaints by NICTD's engineers of the inadequacy of protection at the bridge; to schedule trains so that they were regularly required to converge simultaneously upon and cross over the gauntlet bridge despite the certainty of serious injury or death in the event two trains met head-on; not to properly train and test the engineers to assure their continuing fitness for duty and that, as a result, NICTD's engineers enhanced the injuries and increased the number of fatalities by accelerating train speed immediately prior to the collision, rather than attempting to stop, in a futile attempt to beat each other across the gauntlet. In all of the foregoing, NICTD acted recklessly, or with deliberate indifference to the Class members' due process rights to life, liberty, and freedom from bodily harm. The Complaint also alleged that the other defendants failed to manufacture safe and crashworthy passenger cars for the trains involved and that the trains were unreasonably dangerous and defective.

After the Class filed its Fifth Amended Complaint, all defendants filed various Motions to Dismiss, alleging, *inter alia*, that Count II of the Complaint, which stated a claim under 42 U.S.C. § 1983, failed to state a cognizable cause of action under that statute, and that Counts III and IV of the Complaint, which stated products liability and negligence claims, were preempted by the Boiler Inspection Act, then codified at 45 U.S.C. §§ 22 *et seq*. On July 18, 1995, the Lake Superior Court entered an Order granting the defendants' Motions as to Counts II, III, and IV of the Complaint. *See* Appendix C, *infra*.

In the Court of Appeals, the Class maintained that:

> preemption analysis is inappropriate in this case. The defendants cannot overcome the strong pre-

> sumption that state law is not preempted by federal law, particularly since they seek to preempt modern state law theories of crashworthiness and products liability with an antiquated statute.

Brief of Appellants at 9-10. The Class further maintained that:

> All elements of a § 1983 cause [of action for violation of the Class members' due process rights] have been alleged in the Fifth Amended Complaint and, since these factual allegations must be accepted as true in this proceeding, the Court erred in granting defendants' Motions to Dismiss this cause of action.

Brief of Appellants at 9.

The Indiana Court of Appeals affirmed the dismissal of Counts II, III, and IV on September 11, 1996. App. B. The same Court denied the Class' Petition for Rehearing on October 31, 1996. App. D. The Indiana Supreme Court declined to exercise its discretionary powers of review, denying the Class' Petition to Transfer on May 9, 1997. App. A.

REASONS FOR GRANTING THE WRIT

The Indiana Court of Appeals' decision reveals multiple issues of national importance. First, when the parties briefed the issues, this Court had not yet issued its opinion in *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240 (1996). In *Medtronic*, this Court announced an analysis of preemption different from its previous analysis announced in *Cippollone v. Liggett Group*, 505 U.S. 504, 112 S.Ct. 1062 (1992). *Cippollone*, however, was a significant basis for the Indiana Court of Appeals' opin-

ion. Second, this Court's decision in *Medtronic* was a plurality opinion; the nation therefore still lacks clear direction on the issue of when federal statutes will and will not preempt state common-law tort actions. Third, while the general rule is well established that government owes its citizens no constitutional duty to ensure minimal levels of safety, the Circuits disagree as to the existence and/or application of various exceptions to the general rule. This case affords the Court the opportunity to offer the nation clear guidance in two areas of vast importance by stating in no uncertain terms the proper boundaries within which federal law may preempt state tort actions, and delineating what exceptions exist to the general rule that government owes no duty under the Due Process Clause to protect its citizens from danger—particularly when the danger is state-created and the state has also restricted safer, private alternatives.

I.

Medtronic, Inc. v. Lohr set forth a new preemption analysis which should be reinforced and clarified in this case.

The Indiana Court of Appeals' analysis in concluding that the Boiler Inspection Act ("BIA") preempted the Class' claims regarding safety and crashworthiness is simple. First, the Court relied upon the following language from *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 47 S.Ct. 207 (1926):

> We hold that state *legislation* is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the

> standard set by the Commission must prevail, *requirements* by the states are precluded.

272 U.S. at 613, 47 S.Ct. at 210 (emphasis added).

Second, in addition to *Napier*, the Indiana Court of Appeals relied upon the following statement from *Cippollone v. Liggett Group*, 505 U.S. 504, 112 S.Ct. 2608 (1992):

> state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

505 U.S. at 521, 112 S.Ct. at 2620.

Combining the holding from *Napier* and the foregoing statement from *Cippollone*, the Indiana Court of Appeals found that the BIA preempted the Class' safety and crashworthiness claims. The Indiana Court of Appeals, however, did not have the benefit of the preemption analysis announced by this Court in *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240 (1996).

In *Medtronic*, the Medical Device Amendments to the Food, Drug and Cosmetic Act (hereinafter "MDA") were before this Court to determine their preemptive effect, if any, on a Florida plaintiff's common-law cause of action against the manufacturer of a pacemaker which subsequently failed. The District Court dismissed the plaintiff's complaint in its entirety, and the Eleventh Circuit reversed in part, finding that the plaintiff's negligent design claims were not preempted, but that the negligent manufacture and failure to warn claims were.

In concluding that none of the plaintiff's claims were preempted by the BIA, *Medtronic* nullified the second prong of the analysis outlined above by expressly limiting *Cippollone* to the facts and statute at issue therein. Justice Stevens expressly declined to follow *Cippollone*:

> although we have on prior occasions concluded that a statute preempting certain state "requirements" could also pre-empt common-law damages claims, see *Cippollone*, 505 U.S. at 521-522 (opinion of Stevens, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

___ U.S. at ___, 116 S.Ct. at ___.

Justice Breyer's concurring opinion in *Medtronic* verifies that the preemption analysis announced in *Medtronic* was decided without regard to *Cippollone*. Justice Breyer noted that *Cippollone* seemed to apply and, while concurring in the result, questioned the plurality's failure to apply *Cippollone*:

> This [*Cippollone*] rationale would seem applicable to the quite similar circumstances at issue here.

___ U.S. at ___, 116 S.Ct. at ___. Justice Breyer specifically declined to join in Part IV of the opinion which distinguished the Medical Device Amendments to the Food, Drug and Cosmetic Act from the statute at issue in *Cippollone*:

> I do not join Part IV, which emphasizes the differences between the MDA and the pre-emption statute at issue in *Cippollone*, because those differences are not, in my view, relevant in this case.

___ U.S. at ___, 116 S.Ct. at ___.

While *Napier* expressly prohibits states from enacting *legislation* which conflicts or overlaps with the BIA, *Napier* does not hold that anything other than legislation is "precluded." In fact, the language from *Napier* quoted above suggests that the "requirements" which states could not impose were legislation and nothing else.

This case, like *Medtronic*, is one in which *Cippollone*'s statement does not apply. Yet the Indiana Court of Appeals and other courts continue to rely upon *Cippollone* as controlling authority for the proposition that federal statutes preempt common-law tort actions.[1] With *Cippollone* limited solely to the statute at issue in *Cippollone*, all that remains is *Napier*'s prohibition of state legislation and long-standing presumptions against a finding of preemption.[2]

As noted above, *Medtronic* was a plurality opinion with Justices Stevens, Kennedy, Souter, and Ginsburg joining in Part IV of the opinion which distinguished *Cippollone* and rejected the argument that any common-law cause of action was a prohibited "requirement" imposed by the state. Justice Breyer concurred in the result, but declined to join the rationale of Part IV. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Thomas and Scalia, dissented from Part IV of the opinion, finding

---

[1] *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Springston v. Consolidated Rail Corp.*, 863 F. Supp. 535, 541 (N.D. Ohio 1994); *Eldridge v. Missouri Pac. R. R.*, 832 F. Supp. 328, 330 (E.D. Okla. 1993).

[2] *Medtronic* held that all preemption questions are analyzed in light of two presumptions: (1) the sovereignty of the states and their ability to assert historic police powers, and (2) legislative intent as the ultimate factor in deciding preemption cases.

no justification for the Court's apparent departure from its position in *Cippollone*. In light of *Medtronic*'s inconclusive 4-1-4 decision, clear guidance from this Court will dissipate the confusion and guide national jurisprudence regarding the proper limits of the preemptive power of federal statutes.

II.

This Court should resolve the confusion among the Circuits and delineate whether exceptions exist to the general rule that government owes no constitutional duty to protect its citizens when the government creates the danger and restricts safer, private alternatives.

Certiorari should be granted because this case affords an opportunity to resolve the confusion among the Circuits regarding whether there are exceptions to the general rule that government owes no duty under the Due Process Clause to protect its citizens from danger. The general rule is not in dispute. What is confused among the Circuits is the proper recognition and application of any exceptions to the general rule. These exceptions have been inconsistently recognized and divergently applied among the various Circuits.

A. "State-Restricted Alternatives" Exception

The Indiana Court of Appeals, in concluding that the "state-restricted alternatives" exception did not apply, acknowledged that the exception derives from the following language in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988):

> if the state suppressed private ambulance services, or so flooded the market with subsidized (free) aid that private rescue services no longer could make a profit and hence disappeared, the state would have a duty to furnish ambulance services.

847 F.2d at 1223. Relying on the foregoing, the Court of Appeals ostensibly concluded that if the passengers aboard the two commuter trains had a choice as to any other means of travel, the exception did not apply.

The "state-restricted alternatives" exception applies in this case. By acquiring the only passenger train service from Chicago to Northwest Indiana, and by financing it to the extent that no private alternatives can profitably exist, the state effectively controls all alternative commuter rail transportation in Northwest Indiana. Through its 100% subsidy of the passenger train service, the government has virtually eliminated all alternative modes of public transportation for commuters between Northwest Indiana and Chicago. Here, the government increased the Class' risk by its actions. The government satisfied the second part of the analysis by boarding passengers on the only commuter train line in Northern Indiana, propelling two trains toward one another at high speeds, scheduling them to meet at an extremely hazardous single-track bridge, and rendering them helpless to take any actions to protect themselves.

Concluding that no liability attaches because Class members could have travelled by some other means nullifies the exception. Few situations, if any, exist in which the public would have *no* travel alternatives, however impractical. The Class members could have walked

to their destinations, but did not. Even if it is proper to consider alternative means of travel, the inquiry does not end with whether *any* alternatives existed, but whether the government *restricted* those alternatives.

B. "State-Created Danger" Exception

The confusion among the Circuits is most apparent in cases which discuss the "state-created danger" exception. When government creates a danger and is recklessly indifferent to that danger, liability should attach under the Due Process Clause. *See e.g., White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). NICTD and others placed over two hundred passengers in trains scheduled to simultaneously converge on a single-track bridge from opposite directions several times a day at high speeds. The only safeguard was a signal light with a sordid history of failure. The government never warned passengers of the dangers or gave them an opportunity to exit the train on one side of the treacherous bridge and reboard on the other. To exacerbate the situation, the two trains accelerated rather than slowed as they converged upon the bridge. The government's actions imposed on the governmental defendants a duty to assure the safety of passengers they placed in danger.

> When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk.

Archie v. City of Racine, 847 F.2d at 1222-23 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 1338 (1989).

In rejecting the "state-created danger" exception, the Indiana Court of Appeals relied upon other Circuits' rejection of the exception. The Class readily recognizes the split among the Circuits as to whether the state incurs a duty whenever it exposes citizens to danger it creates. The greater weight of authority recognizes the exception.[3]

In fact, the exception was implicitly approved by this Court in one of the cases that NICTD relied upon in arguing that it owed no constitutional duty to the members of the Class aboard the ill-fated trains. NICTD relied upon and cited *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 109 S.Ct. 998 (1989) as authority for the proposition that no "state-created danger" theory was even viable under the law. (NICTD's Brief at 22). In *DeShaney*, the plaintiff brought suit against a county welfare department after the welfare department ignored repeated pleas for intervention for a child whom hospital authorities suspected was being repeatedly beaten. Chief Justice Rehnquist, writing for this Court, actually suggested the opposite in discussing *DeShaney*'s facts:

> [T]he harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in

---

[3] *See e.g., Archie v. City of Racine*, 847 F.2d 1211, 1222-23 (7th Cir. 1988); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986); *Gregory v. City of Rogers*, 921 F.2d 750 (8th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2442 (1993); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

> no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*

489 U.S. at 201, 109 S.Ct. at 1006 (emphasis added). The obvious import of the emphasized portion of the foregoing is that had those facts been true, the result would have been different.

NICTD, however, is not alone in its confusion regarding whether a "state-created danger" exception exists, and if it does, its proper application. The Third Circuit, for example, rejects the "state-created danger" exception.[4] In *Mark v. City of Hatboro*, 51 F.3d 1137 (3d Cir. 1995), a business owner brought suit when a volunteer fire fighter deliberately set fire to his automobile repair business. The Third Circuit acknowledged that other Circuits had recognized and applied the exception, but stated that:

> For our part, we have yet to decide definitively whether the state-created danger theory is a viable mechanism for finding a constitutional injury.

51 F.3d at 1152. In fact, the Third Circuit conceded that its confusion ran even deeper in that some of its cases appeared to analyze purported constitutional violations based upon the state-created danger theory:

---

[4] Notwithstanding the Third Circuit's rejection of the exception, the Indiana Court of Appeals nonetheless selected the Third Circuit case of *Searles v. Southeastern Penn. Transp. Auth.*, 990 F.2d 789 (3d Cir. 1993) as the linchpin of its decision, calling it "particularly persuasive." App. B.

> After undertaking a thorough review of our case-law touching upon the underlying constitutional violation . . . we have found language in the cases supporting and opposing the existence of a state-created danger theory. Perhaps at some point we will have to harmonize our cases.

Id.

Likewise, the Eighth Circuit has expressed a reluctance to impose liability under the Due Process Clause on the basis of state-created danger:

> We cannot agree with those who have suggested that one comment toward the end of the *DeShaney* opinion—"nor did [the State] do anything to render him any more vulnerable to [the risk of private violence]," [citation omitted]—signals the Supreme Court's approval of § 1983 liability whenever a state actor has increased the risk of harm from private sources. Such a ruling would make § 1983 virtually coterminous with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected.

Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 733-34 (8th Cir. 1993).

Notwithstanding the rejection of this exception by the Third and Eighth Circuits, many courts have recognized and applied it. In *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), the Eleventh Circuit imposed upon a municipality a duty to protect a town clerk who was abducted and terrorized by an inmate with a history of violent crimes after prison officials assigned that inmate to community service work. In *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2442 (1993), the

Ninth Circuit found prison officials liable to a nurse employed by the prison after she was raped by a known violent sex offender assigned to work with her at the prison. In *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), the Second Circuit permitted a § 1983 action against police officers who allegedly conspired with a group of skinheads to allow them to beat up demonstrators. In perhaps the most oft-quoted discussion of the exception, Judge Posner and the Seventh Circuit stated that:

> if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into the snakepit.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

Among these respective positions, the Indiana Court of Appeals has apparently chosen to confuse the matter further by following and adopting the position of the Third Circuit. The confusion does not end, however, with the various Courts of Appeal. Constitutional scholars also seek direction from this Court on the proper application of *DeShaney* as well as any exceptions thereto.

> [S]ince the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, a clear consensus has yet to emerge on the criteria for defining the circumstances that give rise to a constitutional duty of the state to provide protection to persons from acts of private violence.

Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435 (1994). Professor Blum went on to observe:

> The lower courts are obviously struggling to formulate a coherent theory for applying the "in custody" and "state-created danger" exceptions to *DeShaney*'s no-affirmative-duty rule. A review of recent cases reveals the fine lines and distinctions courts are drawing. Characterizations about the custodial or noncustodial context of the case and, if noncustodial, whether defendants have committed sins of omission or commission, may determine not only whether a duty to protect exists at all, but also what level of culpability will be required in order to state a claim under the Due Process Clause.

Id. at 471.

III.

The questions presented are important.

The rampant confusion in properly recognizing or applying exceptions to the general rule that government owes no duty to its citizens to protect them from harm is manifest. This Court appears, moreover, to be in a state of flux on the issue of preemption given its conclusion in *Medtronic* and its apparent jettisoning of the rationale of *Cippollone*. Guidance and clarification on these issues would be of benefit not only to the parties to this litigation, but to all. Professor Blum intimates in the latter quotation from her article that issues of constitutional magnitude should not turn on minutiae. That is precisely what will continue to occur, however, should this Court not review, clarify, and delineate the boundaries of affirmative duty imposed on government by the Due Process Clause.

CONCLUSION

Members of the Class suffered unspeakably on January 18, 1993 when two commuter trains collided on a single-track bridge while still accelerating. The dismissal of Counts II, III, and IV of their Fifth Amended Complaint has only exacerbated that suffering. Not only are members of the Class disconcerted by their plight, the nation's jurists cannot seem to proffer any consistent, adequate, or rational explanation for the legal result.

This Court, however, with a review of one case can dispel confusion on two fronts. The Indiana Court of Appeals based its conclusion, in part, on the preemption analysis of *Cippollone* which has been abandoned by this Court. The opinion below is also based in part upon the holding of the Third Circuit Court of Appeals, and other Circuits disagree. At least some of the differences among the Circuits are based on distinctions which can hardly be classified as rising to the level of constitutional magnitude. Percolation among the Circuits following this Court's pronouncement in *DeShaney* has yielded nothing but inconsistent and nonsensical results. *Certiorari* review should be granted, and this Court should halt the current state of affairs in which a government's constitutional duties are dependent upon geography.

Respectfully submitted,

KENNETH J. ALLEN
Counsel of Record
JAMES E. BRAMMER
KENNETH J. ALLEN
& ASSOCIATES, P.C.

Attorneys for Petitioners

APPENDICES

APPENDIX A

STATE OF INDIANA

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS
AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

KENNETH ALLEN

1109 GLENDALE BLVD
VALPARAISO, IN 46383

Cause Number
45A05-9511-CV-00428
Lower Court Number:
45D059301CT110

DILLON, TERRY -V- CHICAGO SOUTHSHORE & SOUTH BEND RR, CO, ET AL.

You are hereby notified that the SUPREME COURT has on this day 5/09/97

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH

THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD,

CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT DICKSON, J., WHO VOTES TO GRANT TRANSFER.

AA

WITNESS my name and the seal of said Court,
this 9TH day of MAY, 1997

/s/ H. John Okeson
Clerk Supreme Court, Court
of Appeals and Tax Court

APPENDIX B

STATE OF INDIANA

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT,
COURT OF APPEALS
AND TAX COURT

(317) 232-1930
FAX (317) 232-8365

KENNETH ALLEN

1109 GLENDALE BLVD
VALPARAISO, IN 46383

Cause Number
45A05-9511-CV-00428
Lower Court Number:
45D059301CT110

DILLON, TERRY -V- CHICAGO SOUTHSHORE & SOUTH BEND RR, CO, ET AL.

You are hereby notified that the COURT OF APPEALS has on this day 9/11/96

ISSUED THE ENCLOSED OPINION:

WITNESS my name and the seal of said Court, this 11TH day of SEPTEMBER, 1996

/s/ H. John Okeson
Clerk Supreme Court, Court of Appeals and Tax Court

B-2

IN THE
COURT OF APPEALS OF INDIANA

IN RE: TRAIN COLLISION AT GARY, INDIANA ON JANUARY 18, 1993 TERRY DILLON, et al., Individually and on behalf of All Other Passengers, Spouses of Passengers, Dependent Next of Kin and Personal Representatives of Deceased Passengers Who Are Members of a Class Certified,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A05-9511-CV-428
CHICAGO SOUTHSHORE & SOUTH BEND RAILROAD CO., a Partnership, The Northern Indiana Commuter Transportation District, Louis T. Klauder & Associates, Willard Blewett, Nippon Sharyo Seizo Kaisha, Ltd., David Riordan, and Sumitomo Corporation,	)	
Appellees-Defendants.	)	

APPEAL FROM THE SUPERIOR COURT
OF LAKE COUNTY
The Honorable James J. Richards, Judge
Cause No. 45D05-9301-CT-110

September 11, 1996

OPINION - FOR PUBLICATION

RUCKER, Judge

This is an appeal from the trial court's grant of a 12(b)(6) motion to dismiss. As a result of a tragic passenger train collision a four count class action lawsuit was filed against various persons and entities (referred to collectively as Defendants). Class representatives (referred to collectively as Dillon) alleged negligence in Count I, violation of 42 U.S.C. § 1983 in Count II, and products liability and negligence in counts III and IV. On motion by Defendants the trial court dismissed Count II, III, and IV. Dillon now appeals contending the trial court erred in so doing. We disagree and therefore affirm.

Facts

On January 18, 1993 and eastbound passenger train traveling from Chicago, Illinois to South Bend, Indiana and a westbound passenger train traveling from South Bend, Indiana to Chicago, Illinois converged simultaneously toward a single-track bridge near Noble Street and 3rd Avenue in Gary, Indiana. The trains collided on the bridge killing seven passengers and injuring numerous others. Representatives of the estates of those killed in the crash along with 142 persons who were injured filed a four count class action lawsuit. Count I alleged negligence on the part of the Chicago South Shore & South Bend Railroad Company and the Northern Indiana Commuter Transportation District, both of which allegedly owned, operated and maintained the railroad.[1]

---

[1] Chicago South Shore has been dismissed from this action and therefore is not a party to the appeal.

Count II alleged a cause of action under 42 U.S.C. § 1983 against the two railroad companies along with Gerald Hanas, Northern's general manager and chief executive, and David Riordan and Willard Blewett, the engineers on the two trains. Counts III and IV asserted claims of products liability and negligence based on alleged defects in the design and structure of the train cars. Northern Indiana Commuter Transportation District along with the Sumitomo Corporation of America, Nippon Sharyo Seizo Kasha, Ltd., and Louis T. Klauder & Associates were named as defendants in Counts III and IV.

After Dillon amended his complaint for the fifth time, defendants Northern, Hanas, and the train engineers (referred to collectively as Northern) filed a motion to strike Count I of the complaint due to alleged procedural defects and because Dillon allegedly requested damages in excess of limitations contained in the Indiana Tort Claims Act (ITCA). Northern also requested dismissal of Count II on grounds that it failed to state a claim upon which relief could be granted. Specifically, Northern contended the complaint failed to allege a constitutional violation but rather merely stated a cause of action in tort. In the alternative Northern contended that the claim was barred by res judicata.[2] As to Counts III and

---

[2] The res judicata argument was based on this court's decision in *In re Train Collision at Gary, Indiana*, 654 N.E. 2d 1137 (Ind. Ct. App. 1995), *reh'g denied*, in which we affirmed the trial court's dismissal of claims contained in Dillon's Fourth Amended Complaint because the claims requested damages in excess of ITCA limitations. According to Northern, the request for actual and punitive damages in the § 1983 claim here is merely an attempt to circumvent the ruling in *In re Train Collision* and to reassert the claims contained in the prior

(continued...)

IV Northern asserted that the state law on which the claims were based had been preempted by the Federal Boiler Inspection Act, 45 U.S.C. §§ 22-29, 31-34. The remaining defendants also filed motions to dismiss Counts III and IV on the same grounds as those which Northern asserted.

The trial court conducted a hearing on the motions and thereafter entered an order dismissing Counts II, III, and IV of the complaint against all defendants. The motion to strike Count I was denied. Under provisions of Ind. Trial Rule 54(B) the trial court entered final judgment, and this appeal ensued in due course.

Discussion

When reviewing a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted this court accepts as true the facts alleged in the complaint. *Hudgins v. McAtee*. 956 N.E.2d 286, 288 (Ind. Ct. App. 1992). Dismissal of a complaint is proper only when it appears that the claimant would not be entitled to recover under any set of facts represented by the pleadings. *Union Fed. Sav. Bank v. Chantilly Farms*, 556 N.E.2d 9, 11 (Ind. Ct. App. 1990).

---

[2] (...continued)
complaint. As such, Northern argues, the § 1983 claim is barred by res judicata. Both parties discuss this issue at length in their briefs on appeal. However, because we dispose of the § 1983 claim on other grounds, we need not address this issue.

I.

Dillon first contends the trial court erred in dismissing Count II which, according to Dillon, alleged a violation of 42 U.S.C. § 1983. Section 1983 provides a civil remedy against any person who, under color of state law, subjects a citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the federal Constitution or federal laws. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 402 (Ind. 1991), *cert. denied*, 112 S.Ct. 1170. In order to recovery damages under § 1983 a plaintiff must show that: (1) he held a constitutionally-protected right; (2) he was deprived of this right; (3) the defendants acted with reckless indifference to cause this deprivation; and (4) the defendants acted under color of state law. *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990). In support of his § 1983 claim Dillon alleged that Northern: (1) failed to install and equip the trains and track near the trestle with motion sensors or other detection devices which would have warned the motormen sufficiently in advance of an imminent collision, (2) failed to properly maintain, repair, remove or redesign the Penn-Wabash gauntlet bridge despite defendants' knowledge that the trestle and track configuration posed an extreme hazard to the safety of passengers, (3) failed to provide adequate warnings or signalization at the Penn-Wabash gauntlet bridge despite a history of repeated signal failures and complaints made by motormen regarding the signals, (4) failed to formulate and implement a safe operating schedule so that trains would not simultaneously converge from opposite directions toward the gauntlet on a regular basis, (5) failed to formulate and implement proper training and testing of engineers and conductors, (6) failed to install and equip

the trains and/or the track near the Penn-Wabash gauntlet bridge with devices which would provide the positive separation of trains and which would automatically stop all eastbound and westbound trains and/or would be fail-safe in the event that eastbound and westbound trains converged simultaneously upon the bridge, (7) failed to timely apply brakes in order to slow the trains prior to the collision and instead quickly accelerated immediately prior to the collision, and (8) failed to operate the railroad for the benefit of the public safety but instead operated and managed the railroad for the personal and pecuniary benefit of Northern management. According to Dillon, Northern's custom and policy of operating the railroad in such a manner was grossly negligent, reckless and deliberately indifferent to Dillon's rights to life, liberty, freedom from bodily harm, personal security and safe travel under the Due Process Clause of the Fourteenth Amendment.

Section 1983 was designed to prevent state actors from violating the constitution and federal statutes and to compensate injured plaintiffs for deprivations of those federal rights. However, the United States Supreme Court has refused to recognize § 1983 liability where the wrong committed by the state actor was traditionally governed by tort law principles. For example, in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126, 112 S.Ct., 1061, 1069, 117 L.Ed.2d 261 (1992), the widow of a sanitation department worker who died of asphyxia after entering a manhole to unstop a sewer line attempted to state a cause of action under § 1983 against the city for her husband's death. She alleged that her husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions

and a constitutional right to be protected from the city of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." *Id.* at 117, 112 S.Ct. at 1064. She further alleged that the city violated that right "by following a custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at job sites and not providing safety warnings." *Id.* The court determined the plaintiff's claim that the city had a constitutional obligation to provide its employees with certain minimal levels of safety and security to be "unprecedented" and "quite different" from claims that the State owes a duty to take care of those who have already been deprived of their liberty. *Id.* at 127, 112 S.Ct. at 1069. Rather, the claim was analogous to a "fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment." *Id.* at 128, 112 S.Ct. at 1070. The Supreme Court therefore affirmed the district court's dismissal of the complaint for failure to state a claim under § 1983.

In like fashion our own supreme court reached a similar conclusion in *Culver-Union Township Ambulance Serv. v. Steindler*, 629 N.E.2d 1231 (Ind. 1994). There the plaintiff asserted a § 1983 claim against a township ambulance service in connection with the death of a man treated for a heart attack. The complaint charged that various policies adopted by the defendant constituted a reckless indifference to the decedent's "right to live" as guaranteed by the Fourteenth Amendment. The court observed that the Fourteenth Amendment does not confer a right to live but rather prohibits a state from depriving any person of life, liberty or property without due

process of law. *Id.* at 1233. Moreover, "[t]he 14th Amendment generally does not confer any affirmative right to governmental aid. It serves 'as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.'" *Id.* at 1233 quoting *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 195-96, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). The court concluded that the complaint alleged no cognizable constitutional violation and consequently affirmed the trial court's dismissal of the § 1983 claim pursuant to Ind. Trial Rule 12(B)(6).

Dillon acknowledges the foregoing authority but contends there are at least three exceptions to the general rule of non-liability under § 1983 which apply to this case: (1) the "in-custody" exception, (2) the "state-restricted alternatives" exception, and (3) the "state-created danger" exception.

Although some courts have recognized exceptions to the general rule that the State owes no duty to provide minimum levels of safety and security, the exceptions have been narrowly applied. The "in-custody" exception applies when a person is involuntarily taken into state custody. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposed upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. at 1005. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalism, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *Id.* at 200,

109 S.Ct. at 1006. We disagree with Dillon's assertion that the train passengers in this case were in the custody of the State within the meaning of *DeShaney*. To the contrary the passengers here were under no obligation to board the trains and instead did so of their own free will. The "in-custody" exception is not applicable.

The "state-restricted alternatives" exception is likewise inapplicable. This exception was recognized in *Archie v. City of Racine*, 845 F.2d 1211 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 1338 (1989). In that case the court held that a § 1983 action did not lie against a municipality for failing to send an ambulance in response to calls for help. The court noted in dicta that "if the state suppressed private ambulance services, or so flooded the market with subsidized (or free) aid that private rescue services no longer could make a profit and hence disappeared, the state would have a duty to furnish ambulance services." *Id.* at 1223. Seizing on the foregoing language Dillon asserts that Northern flooded the market in this case by monopolizing all commuter train services in Northwest Indiana. Even assuming for the sake of argument that Northern flooded the market with commuter train service, Dillon does not assert and indeed makes no argument that alternative modes of transportation were unavailable. As Northern points out neither bus transport nor transportation by private passenger car was affected by operation of the trains. In any event we do not agree that monopolizing all modes of transportation between two points is analogous to the lack of alternative emergency medical services as occurred in *Archie*.

The "state-created danger" exception finds its roots in an observation made by the court in *DeShaney*, 489 U.S.

189, 201, 109 S.Ct. 998, 1006. There the court ruled that although the State may have been aware of the dangers faced by a minor child returned to his abusive father by social workers, "it played no part in their creation, nor did to do anything to render him any more vulnerable to them." In reliance upon this language, a number of courts have imposed § 1983 liability where the State itself created the danger to the victim.[3] However, the state-created danger exception has not been embraced universally. For example in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993) the court found no due process violation where a student who previously had exhibited sexually violent behavior sexually assaulted another student after authorities know-

---

[3] In *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), the court found a duty to protect on behalf of a town clerk who was abducted and terrorized by an inmate with a history of violent crimes after prison officials assigned the inmate to community service work. Similarly, in *L.W. v. Grubbs*, 974 F.2d 199 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2442 (1993), prison officials were liable to a nurse employed by the prison after she was raped by a known violent sex offender assigned to work with her at the prison. In *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), the court allowed a § 1983 action against police officers who allegedly conspired with a group of skinheads to permit them to beat up demonstrators. *See also Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (police had affirmative duty to protect plaintiff after arresting driver of car in which plaintiff was passenger, impounding vehicle, and leaving plaintiff stranded in high-crime area); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into the snakepit").

ingly placed the attacker into a program with vulnerable children. The court observed:

> We cannot agree with those who have suggested that one comment toward the end of the *DeShaney* opinion—"nor did [the State] do anything to render him any more vulnerable to [the risk of private violence]," [citation omitted]—signals the Supreme Court's approval of § 1983 liability whenever a state actor has increased the risk of harm from private sources. Such a ruling would make § 1983 virtually coterminous with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected . . . .

Id. at 734. We find particularly persuasive the case of *Searles v. Southeastern Pa. Transp. Auth.*, 990 F.2d 789 (3d Cir. 1993). In that case the plaintiff on behalf of herself and other persons similarly situated, filed a complaint against the Southeastern Pennsylvania Transportation Authority (SEPTA) for damages for fatal injuries sustained by her husband in the derailment of a railcar operated by SEPTA. The derailment occurred after a motor fell from a railcar and struck a switch causing the front and rear wheels of the car to go onto separate tracks. In her complaint, the plaintiff asserted § 1983 liability based on SEPTA's alleged "policy or custom of following a maintenance inspection and repair program . . . which was grossly negligent, in reckless disregard for the safety of the public, and . . . continued with deliberate indifference to the rights of others." *Id.* at 790. The complaint further alleged that as a result of SEPTA's acts or omissions the plaintiffs were deprived of "safe and continued enjoyment of life, and liberty without due process of law . . ." *Id.*

The court compared the allegations of the complaint with those in *Collins*, 502 U.S. at 117, 112 S.Ct. at 1064 and noted their similarity. Concluding that just as the constitution did not impose a duty upon a government employer to provide its employees with a safe working environment, the *Searles* court determined that the constitution likewise did not impose a duty on SEPTA to provide a safe passenger environment. *Id.* Paraphrasing *Collins*, the court held that the plaintiff's claim in that case was "analogous to a fairly typical state law tort claim: defendants breached their duty of care to her husband by failing to provide safe transportation." *Searles*, 990 F.2d at 793.

In similar fashion Count II of Dillon's complaint also is analogous to a typical tort claim for negligence. Although 42 U.S.C. § 1983 was designed to compensate injured plaintiffs for deprivation of federal rights by state actors, it was not intended to supplant state tort law by providing a remedy for every wrong. *Culver-Union*, 629 N.E.2d, 1231, 1233. A state tort does not become a constitutional violation simply because it is committed by a government actor. *Id.* Dillon may proceed on the negligence claim contained in Count I of his complaint; however the trial court properly dismissed the § 1983 claim contained in Count II. We find no error on this issue.

II.

Dillon next contends the trial court erred in dismissing Counts III and IV which asserted products liability and negligence based on alleged defects in the design and structure of the train cars. Defendants counter the trial court properly dismissed those counts because Dillon's

claims thereunder are preempted by the Federal Boiler Inspection Act (Act), 45 U.S.C. §§ 22-29, 31-34.[4] Dillon first argues the train cars at issue here are not "locomotives" within the meaning of the Act but rather are "passenger train cars" as alleged in the complaint. The argument continues that because this case was resolved pursuant to a motion to dismiss, the allegations of the complaint must be taken as true.

Defendants counter that the train cars in question were established as locomotives by the affidavit of Gerald Hanas which was submitted with defendant Sumitomo's motion to dismiss. According to Defendants the filing of the affidavit converted the motion to dismiss into a motion for summary judgment pursuant to Ind. Trial Rule 12(B)(8). As such, Dillon was required to present T.R. 56 materials demonstrating a genuine issue for trial which he failed to do. Thus, Defendants contend, because Dillon did not present evidence in contradiction to the affidavit, the proposition that the cars are locomotives is undisputed and Defendants are entitled to summary judgment as a matter of law.

When a motion to dismiss is filed pursuant to Trial Rule 12(B)(6) and matters outside the pleadings are presented to and not excluded by the trial court, the motion shall be treated as one for summary judgment and disposed of as provided in Ind. Trial Rule 56. T.R. 12(B)(8).

---

[4] The Act provides in relevant part: "It shall be unlawful for any railroad to use or permit to be used on its line any *locomotive* unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put . . ." 45 U.S.C. § 23 (emphasis added).

Once a motion is thus converted, the party opposing the motion has a reasonable opportunity in which to present T.R. 56 materials demonstrating an issue for trial. T.R. 12(B)(8); T.R. 56(C). The adverse party may not rest upon the mere allegations or denials in his pleadings but must set forth specific facts demonstrating a genuine issue for trial. T.R. 56(E); *ITT Commercial Fin. Corp. v. Union Bank & Trust Co.*, 528 N.E.2d 1149 (Ind. Ct. App. 1988). If the adverse party fails to meet this burden, summary judgment may be granted. *Id.*

The record is unclear whether the trial court considered the affidavit of Gerald Hanas and converted the motion to dismiss into one for summary judgment. However, the dispute on appeal concerning locomotives versus passenger train cars was never contested before the trial court. Rather the issue regarding the train cars was first raised in a memorandum in support of the motion to dismiss filed by Northern on March 8, 1995. The memorandum alleged that each of the train cars involved in the collision was "self-propelled, contained propelling motors, and was designed to carry passenger traffic, and therefore, was a 'locomotive' as defined by the Federal Boiler Inspection Act, 45 U.S.C., § 22-29, 31-34." *Record* at 59. On April 11, 1995 and on June 1, 1995, respectively, defendants Klauder and Sumitomo filed similar motions in which they also alleged that the cars were locomotives within the meaning of the act. Further, the memorandum in support of defendant Nippon's motion to dismiss, filed June 13, 1995 and the July 10, 1995 reply brief filed by Northern and Hanas both asserted that the cars were locomotives and that the fact was not in dispute. Indeed, in its response to the motions, Dillon did not deny that the cars were locomotives

nor did he file any other pleading or present any evidence disputing that fact.[5] We find unpersuasive Dillon's contention on appeal that the complaint's characterization of the cars as "passenger train cars" precludes a finding by the trial court that the cars are locomotives. To the contrary the complaint's characterization is consistent with the definition of locomotives under the Act which defines them as "on-track equipment . . . with one or more propelling motors designed to carry freight or passenger traffic or both . . ." 49 CFR 229.5(I). Because Dillon did not contest the representation that the train cars were locomotives under the Act, that representation is taken as true for purposes of resolving the motions to dismiss.

Dillon also contends that even assuming the train cars at issue here are locomotives within the meaning of the Act the trial court nonetheless erred in dismissing Counts III and IV because there was no federal preemption. First, according to Dillon there is a strong presumption against preemption which cannot be overcome absent a showing that such is the clear and manifest purpose of Congress. Second, Dillon argues that under the "new" preemption analysis applied in *Wilson v. Pleasant*, 660 N.E.2d, 327, 334 (Ind. 1995) *reh'g denied*,

---

[5] At the hearing on the motions to dismiss Dillon did finally raise the issue of whether the train cars fell within the provisions of the Act. However he did not contend that the cars were not locomotives under the Act. Rather Dillon merely suggested that the filing of Gerald Hanas's affidavit created an issue of fact which precluded entry of an order of dismissal. Dillon offered no evidence in contradiction of the affidavit and did not request additional time in which to present such evidence.

Defendants cannot prevail on a claim of federal preemption unless they demonstrate (1) that it is impossible for a private party to comply with both state and federal requirements or (2) that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Because neither element was established in this case, the argument continues, the Defendants' preemption claim must fail.[6]

Dillon correctly observes that there is a strong presumption against preemption of state law by federal statute or regulation. *California v. ARC American Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989). The historic police powers of the states are not to be superseded by federal law unless that was the clear and manifest purpose of Congress. *Wilson*, 660 N.E.2d at 329 quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947), *rev'd on other grounds* 331 U.S. 247, 67 S.Ct. 1160, 91 L.Ed. 1468 (1947). Dillon also correctly observed that in *Wilson*, our supreme court set forth two factors it considered in determining whether the plaintiff's state law damages claim was preempted by federal statute. How-

---

[6] Dillon also claims that because the Act was repealed in 1994, shortly after the accident in this case, there is no sound policy reason for applying a preemption analysis based on the statute. However, as Northern points out the Act was not repealed but was simply recodified into 49 U.S.C. as part of Congress's recodification of all "laws related to transportation in one comprehensive title . . ." H.R. Rep. No. 180, 103d Cong., 1st Sess. 3 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. Furthermore, the Act as originally enacted remains in effect as to "rights and duties that matured, penalties that were incurred, and proceedings that were begun "before the recodification. P.L. 103-272, Sec. 7(b), 108 Stat. 1379.

ever, the court expressly held that its analysis applied only to a claim of "implied conflict pre-emption" and that no claim of "field pre-emption" had been made in that case. *Id.* at 334, 330 n.3.

Field preemption occurs when federal law "so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) quoting *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152. In *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 47 S.Ct. 207, 209, 71 L.Ed. 432 (1926), the United States Supreme Court held that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and [its] tender and all of its appurtenances." The court rejected the argument that a state's laws could remain in effect because the federal authorities failed to regulate use of the specific safety equipment mandated by the state's laws:

> The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has not bearing upon the construction of the act delegating the power. We hold that *state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the Commission leads to that conclusion. *Because the standard set by the Commission must prevail, requirements by the states are precluded*, however commendable or however different their purpose.

Napier, 272 U.S. at 613, 47 S.Ct. at 210 (emphasis added).

It is clear that the Act's preemptive effect extends to common law tort actions. As the Supreme Court observed in *Cipollone v. Liggett Group*, 505 U.S. 504, 521, 112 S.Ct. 2608, 2620, 120 L.Ed.2d 407 (1992), "state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775. Thus in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) the Ninth Circuit held that a common law negligence action relating to use of strobe or oscillating headlights on locomotives was preempted by the Act. Also, in *Springston v. Consol. Rail Corp.*, 863 F.Supp. 535, 541 (N.D. Ohio 1994) the plaintiff's state law negligence and product liability claims relating to reflective materials, oscillating, strobe and ditch lights on locomotives were likewise barred. *See also Eldridge v. Missouri Pac. R.R.*, 832 F.Supp 328, 330 (E.D. Okla. 1993) (civil action arising out of train/car collision alleging inadequacy of locomotive warning devices preempted by the Act.)

In like fashion, here Dillon's claims regarding alleged defects in the design and structure of the train cars are preempted by the provisions of the Act. The trial court's dismissal of Counts III and IV of the complaint was appropriate.

Judgment affirmed.

SHARPNACK, C.J., and BARTEAU, J., concur.

APPENDIX C

STATE OF INDIANA)		IN THE SUPERIOR COURT
) SS:		OF LAKE COUNTY
COUNTY OF LAKE)		CIVIL DIVISION, ROOM FIVE SITTING AT HAMMOND, INDIANA
IN RE:	)	THIS DOCUMENT
	)	RELATES TO ALL
TRAIN COLLISION AT GARY,	)	ACTIONS CONSOLI-
INDIANA ON JANUARY 18, 1993,	)	DATED UNDER:
	)	
TERRY DILLON, et al.,	)	CAUSE NO.
Individually and in Behalf	)	45D05-9301-CT-110
of All Other Passengers,	)	
Spouses of Passengers,	)	
Dependent Next of Kin and	)	
Personal Representatives	)	
of Deceased Passengers	)	
Who Are Members of the	)	
Class Certified Herein,	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
CHICAGO SOUTH SHORE	)	
& SOUTH BEND RAILWAY	)	
COMPANY a/k/a CHICAGO	)	
SOUTHSHORE & SOUTH	)	
BEND RAILROAD, and	)	
NORTHERN INDIANA	)	
COMMUTER TRANSPOR-	)	
TATION DISTRICT, et al.,	)	
Defendants.	)	

ORDER OF JULY 18, 1995

This cause was submitted to the Court on July 12, 1995, on the motions of Northern Indiana Commuter

Transportation District and Chicago South Shore & South Bend Railroad and Gerald Hanas, Willard Bluitt and David Riordan, Nippon Sharyo Seizo Kaisha, Ltd. and Sumitomo Corporation of America. Arguments were heard, and the Court now determines that Defendants' motions will be granted as to Counts Two, Three and Four of Plaintiffs' Fifth Amended Complaint, and overruled as to Count One of Plaintiffs' Fifth Amended Complaint. These three counts are dismissed as to all Defendants. Plaintiff is ordered to amend the caption and the prayer of Count One to reflect previous rulings of this Court. The motions to dismiss are overruled as to Count One of Plaintiffs' Fifth Amended Complaint.

The Court also now grants the motion of the Estate of Willacker filed December 2, 1993, to opt into this class action.

ALL OF WHICH IS SO ORDERED this 18th day of July, 1995.

/s/ James J. Richards
JAMES J. RICHARDS, J U D G E

Distribution:
Kenneth Allen
Michael C. Harris
Robert M. Burke
Michael J. Daley
Ronald Kuker
Steven G.M. Stein
Eugene I. Pavalon
Storrs W. Downey
Daniel A. Gioia
Wayne Kruzier

APPENDIX D

STATE OF INDIANA

217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. JOHN OKESON
CLERK OF THE SUPREME COURT, (317) 232-1930
COURT OF APPEALS AND TAX COURT FAX (317) 232-8365

KENNETH ALLEN

1109 GLENDALE BLVD
VALPARAISO, IN 46383

Cause Number
45A05-9511-CV-00428
Lower Court Number:
45D059301CT110
Court of Appeals No:

DILLON, TERRY -V- CHICAGO SOUTHSHORE & SOUTH BEND RR, CO, ET AL.

You are hereby notified that the COURT OF APPEALS has on this day 10/31/96 APPELLANT'S PETITION FOR REHEARING DENIED.

JOHN T. SHARPNACK,
CHIEF JUDGE AA

WITNESS my name and the seal of said Court,
this ___ST day of OCTOBER, 1996

/s/ H. John Okeson
Clerk Supreme Court, Court
of Appeals and Tax Court